LIBRARY
SUPREME COURT, U. S.

AUG 4 1973
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No. 73-240

HARDIE CHRISTOPHER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILFRED C. RICE

2436 Guardian Building
Detroit, Michigan 48226

Attorney for Petitioner

RALPH B. GUY

United States Attorney
Eastern District of Michigan

Attorney for Respondent

COURT INDEX PRESS, INC. — 807 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF QUESTIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT:

1. Is the decision of the Court of Appeals for the Sixth Circuit in affirming the judgment of the Trial Court in this cause clearly in conflict with a prior decision of the Court of Appeals for the Fifth Circuit considering the same issue (U.S. 30 L. Ed. 2d 810) where in the instant case the Trial Court refused to grant defense counsel's motion to reconsider a prior motion to quash the search warrant and suppress the evidence at trial after it was disclosed that facts related in the affidavit for the search warrant were incorrect or misleading to the extent that had the truth been known by the Magistrate signing the warrant, the search warrant probably would not have been issued; further, must the Court consider the use of tainted or improperly obtained evidence by the Government at any stage of proceedings? 14

2. The Trial Court erred in refusing to order disclosure of an informant who is not claimed to be reliable but merely "confidential" and said informant alleges to have seen approximately two (2) pounds of white powdery

Page

substance at defendant's home that "Christopher" represented to be therein two (2) days before issuance of the search warrant, where in fact there are two (2) Hardie Christophers living at said address and the informant does not describe either 21

3. The Trial Court's frequent questioning of witnesses on matters of substance and credibility and becoming personally involved in presenting and connecting up evidence over objection of defense counsel seriously impaired the defendant's right to a fair trial as guaranteed by the State and Federal Constitutions 24

4. The Trial Court erred in receiving government Exhibits 6 (a), (b), (c); 7 (a), (b), (c); 8 (a), (b), (c); 9 (a), (b), (c); 10 (a), (b), (c); 11 (a), (b), (c) over objection of defense counsel where there was no tracing of the complete chain of custody and control over the evidence from the time of seizure to the time of trial 26

5. The decision and findings of the Trial Court are clearly erroneous and against the great weight of evidence where the corpus delicti of Count II could only be established by an alleged admission by the defendant and there was no other clear or positive corroborating evidence in support thereof. 27

CONCLUSION 29

APPENDIX: Page

Affidavit for Search Warrant 30

Indictment 34

Motion to Suppress Evidence & Quash Search Warrant; Motion for Disclosure of Informant or Dismissal; Motion to Suppress Alleged Admission 36
Notice of Hearing [attached to Motions, etc.] 39

Brief in Support of Motion to Quash Search Warrant and Suppress Evidence, Disclosure of Informant or Dismissal and/or Suppression of Alleged Admission 40

Response to Motions to Suppress Evidence, Compel Disclosure of Informant and Suppress Admissions of Defendant 45

Criminal Record of Charles Fisher Morrow 49

Order Setting Bail on Appeal 51

Order of the Court of Appeals Affirming Lower Court 53

TABLE OF AUTHORITIES

Cases: Page

Favre v. Henderson, 318 F. Supp. 1384 (Ed. La. 1970) 23
Glover v. State, 251 N.E. 2d 814 24
Mooney v. Houston, 294 U.S. 103 26
People v. Blakes, 382 Mich. 570, 170 N.W. 2d 832 .. 28
People v. Harris, 41 Mich. App. 389 (1972) 23
People v. Lee, 231 Mich. 607 28
People v. Smith, 159 N.W. 2d 174 (Mich.) 25
People v. Wilder, 160 N.W. 2d 749 (Mich.) 25
Roviaro v. U. S., 353 U.S. 53, 1 L. Ed. 2d 639, 77 S. Ct. 623 22
State v. Burnett, 42 N.J. 389, 201 A. 2d 46 24
State v. Texeira, 433 P. 2d 593, 599 24
U. S. v. Lanham, 416 F. 2d 1140 (1969) 25
U. S. v. Upshaw, 448 F. 2d 1218 ..... 14, 19
Wong Sun v. U. S., 371 U.S. 471 27

Statute:

28 U.S.C. Sec. 1254 (1) 2

Other Authorities:

Gillespie Criminal Law, Section 23, 2d Ed. 28

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No. _____

HARDIE CHRISTOPHER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on June 14, 1973.

CITATIONS OF OPINIONS BELOW

The opinion of the District Court finding Petitioner Guilty and sentencing him to five (5) years and $5,000.00 fine September 5, 1972. Order of the Court of Appeals affirming the Judgment of the Trial Court June 14, 1973.

JURISDICTION

The Order of the Court of Appeals was entered June 14, 1973. Motion for extension of time to file Petition for Certiorari was received by the Court untimely and returned to Petitioner. The jurisdiction of this Court is invoked under 28 USC, Sec. 1254 (1).

STATEMENT OF QUESTIONS INVOLVED

1. Is the decision of the Court of Appeals for the Sixth Circuit in affirming the judgment of the Trial Court in this cause clearly in conflict with a prior decision of the Court of Appeals for the Fifth Circuit considering the same issue (U.S. 30 L. Ed. 2d 810) where in the instant case the Trial Court refused to grant defense counsel's motion to reconsider a prior motion to quash the search warrant and suppress the evidence at trial after it was disclosed that facts related in the affidavit for the search warrant were incorrect or misleading to the extent that had the truth been known by the magistrate signing the warrant, the search warrant probably would not have been issued; further, must the Court consider the use of tainted or improperly obtained evidence by the government at any stage of proceedings.

2. Whether the Trial Court erred in refusing to order disclosure of an informant who is not claimed to be reliable but merely confidential and said informant alleges to have seen approximately two (2) pounds of white powdery substance at Defendant's* home that Christopher represented to be heroin two (2) days before issuance of the search warrant, where, in fact, there are two (2) Hardie Christophers living at said address and the informant does not describe either.

---

*Petitioner herein.

3. Whether the Trial Court's frequent questioning of witnesses on matters of substance and credibility and becoming personally involved in presenting and connecting up evidence over objection of defense counsel seriously impaired the Defendant's right to a fair trial as guaranteed by the state and federal constitutions.

4. Whether the Trial Court erred in receiving government exhibits 6(a), (b), (c); 7(a), (b), (c); 8(a), (b), (c); 9(a), (b), (c); 10(a), (b), (c); 11(a), (b), (c), where there was no tracing of the complete chain of custody and control over the evidence from the time of seizure to the time of trial.

5. Whether the decision and findings of the Trial Court are clearly erroneous and against the great weight of evidence where the corpus delicti of Count II could only be established by an alleged admission by the Defendant and there was no other clear or positive corroborating evidence in support thereof.

STATEMENT OF THE CASE

GOVERNMENT WITNESSES

S/A Gerard F. Finnegan — Testified that he had been with the Bureau of Narcotics and Dangerous Drugs three (3) years (TT. 9). Relying on information received from a confidential informant, he secured a search warrant to search 2244 Edison Street, Detroit, Michigan for "controlled substances, and evidence of sales transactions and dealings in connection with controlled substances." (See TT. 10 and App. Exh. 1)

He, in the company of nine (9) agents and three (3) Detroit Police Officers drove past the address at 2:45 p.m. At that time, he saw a 1966 Maroon Ford parked across the street, directly in front of the address to be searched, with one (1) occupant therein. When they returned to execute the search warrant at 3:00 p.m., the same car had four (4) occupants therein and was about to pull from the curb. He ordered the occupants of the car to stay where they were (TT. 11). The car and occupants ignored his order and sped away. The car was pursued by another Police car. After a few minutes the occupants of the car, along with some packages of suspected narcotics were returned to the address to be searched. The occupants of the car refused to make any statements. They were arrested, taken to the Federal Building and released the next day without charges.

Upon searching the defendant's premises, all the articles, except the packages brought back with the four (4) occupants of the Maroon Ford, consisting of narcotics, paraphernalia, two (2) pistols and a satchel containing $3,750.00 cash, were confiscated from the premises (TT. 12-14).

The agent proceeded to testify that the defendant admitted selling the four (4) packages brought back into the house with the four (4) occupants of the Maroon Ford to "Dallas." Defense counsel objected on the grounds that the corpus delicti of Count II could not be established by an admission (TT. 15). The Court received the testimony subject to connecting up by the government.

The agent proceeded to testify that there were many other envelopes in defendant's home similar to the ones the officer had found on the street after the occupants of the Ford were apprehended. This testimony was objected to because the envelopes referred to were not produced and they were the best evidence.

Objection overruled (TT. 21).

The exhibits were found by other agents (TT. 29). Defendant changed clothes from the north bedroom before taken out of the house (TT. 33). Hardie Christopher, Sr. (Defendant) and Hardie Christopher, Jr. (Son, 20 years old) were the only persons on the premises at the time of the forced entry.

•

CROSS-EXAMINATION

Five (5) people (Hardie Christopher, Sr., Quincy Silver, Charles B. Allen, Diamond Stewart and James Watts) were arrested as a result of the raid (TT. 35). The four (4) occupants of the Ford were released. There was no money or other verification of the alleged sale to Dallas (TT. 36).

The agent said the statements he made in the Affidavit for the search warrant concerning Charles Morrow and Roy Dawkins were as a result of Police Record Check with the Detroit Police Department (TT. 36-39). There, police records showed the offenses as related in the Affidavit for Search Warrant.

The four (4) occupants of the Ford were not seen, either coming from or going to the address to be searched (TT. 40-41). The agent felt he had a right to hold them although they had committed no infraction of the law to his knowledge, and they were not free to leave at will (TT. 42).

Defense Counsel demanded the name of the alleged confidential informant. The Court sustained the government's objection (TT. 52 and 53). The Court refused to permit defense counsel to further question the Witness about statements he made in the Affidavit for the Search

Warrant (TT. 54). However, the Court reversed himself (TT. 59).

The agent admitted that he did not see defendant's car at the alleged Narcotics Distribution Center (TT. 53 and 60). Admitted that he never saw Morrow or Dawkins at defendant's residence. Testified that he had personally seen Morrow's criminal record (TT. 61). The criminal record of Charles Morrow was shown as defendant's proposed Exhibit No. 1 (TT. 62). The Court stops the cross examination in connection with the proposed exhibit (TT. 63 and 64).

LAWRENCE L. BUER

(Government Chemist from Chicago)

Mr. Buer testified that the exhibits he analyzed were received and removed from the evidence technician. Envelope No. 1 for each exhibit were sealed by someone else (TT. 67-71). That he did not see the technician take the exhibits from the vault. He first saw the exhibits after they were removed from the evidence vault (TT. 76-78). He has nothing to do with receiving and unwrapping evidence (TT. 87). He first saw the evidence March 2, 1972 (TT. 88). Defense Counsel objects to receipt of the evidence by the Court (TT. 90). The Court suggests two methods for offering the evidence objected to (TT. 91).

CROSS EXAMINATION

The witness testified that the envelopes alleged to contain the contraband were not examined for prints (TT. 97). The Court questions the witness and bring out facts not solicited by the prosecution (TT. 98-99).

PATROLMAN ROY BLACKMAN

(Detroit Police Department)

Patrolman Blackman said as the agents arrived in front of the address to be searched, the maroon Ford started to leave and he and his partner pursued the car down 14th Street (TT. 103). At one point before reaching Clairmount Ave., he saw a door of the vehicle open and some articles were thrown out (TT. 104). The car was stopped after turning on Clairmount and the occupants thereof were placed under arrest (TT. 104). They returned to the area where they saw the articles thrown and found packets of suspected narcotics. The arrestees were taken back to the address to be searched and turned over, along with the packets to S/A Mahon (TT. 106).

CROSS EXAMINATION

He did not see the occupants of the Ford violate any law. He heard the Agent say, "Federal Agents. Hold it right there where you are." (TT. 109) The car left anyway and he pursued it. He did not see who threw the packets out of the car and at the time did not know what was thrown out (TT. 114 and 115). The occupants of the car were told they were arrested for "Investigation." (TT. 116) Said that 8-10 minutes elapsed from the time the articles were thrown and his return to pick them up. Admits that other traffic passed that area in the interim (TT. 117).

ALEXANDER T. MAHON

This Agent's testimony was substantially the same as Agent Finnegan, except that he said he and not Finnegan made the field test of the substances on the premises searched

(TT. 125). Also, the packets brought back by Patrolman Blackman were given to him and not Finnegan as previously testified (TT. 126-128).

This agent mailed the contraband exhibits to Chicago (TT. 132). The government again offered the exhibits. Defense counsel objected. The Court overruled the objections (TT. 135-140).

Defense counsel demanded that all agents and policemen participating in the raid of defendant's home be made available as witnesses. The Court refused to order that the police officers be made available. However, the government agreed to make all the Agents available (TT. 140-141).

Defense counsel demanded a chemical analysis by a local chemist. The Court granted the request but would not allow more than one (1) afternoon and would not give a letter or note as requested by the chemist (TT. 142, 208-211). The chemist said he needed more than one afternoon to analyze the exhibits and the agent refused to leave them at the State Scientific Laboratory for the analysis requested by the defendant (TT. 213-223). The Court refused to grant any further time for the analysis (TT. 225). (See also, TT. 226 and 227).

Defense counsel objected to the Court receiving exhibits 2, 3, 4 and 5, because of improper execution of search warrant and the invalidity of the search warrant. The objection was overruled (TT. 150).

Government Exhibit No. 12 consisting of the Personal History Sheet of defendant taken after arrest and part of the normal booking process was offered and received over objection (TT. 160). The prosecution said they wanted to use that to prove defendant's address.

The Agent proceeded to testify that he asked defendant about using narcotics. Defense Counsel's objection was

overruled (TT. 160-162). Agent Mahon testified as to proposed Exhibit 13 (Constitutional Rights Form) that defendant signed the form 10-15 minutes before he asked him about using narcotics. He was certain the question about narcotics was asked before 5:00 P.M. (TT. 165-166). Changed his story when he discovered that the form was signed at 5:00 P.M. (TT. 167). Defense Counsel objected to receipt of Exhibit 13 and related to the Court that counsel phoned the officers on the date of defendant's arrest before 4:00 P.M. and requested permission to see his client and was told they were busy booking prisoners and counsel could not see defendant at that time (TT. 168 and 169). The Court overruled the objection.

The Agent was permitted to testify concerning the significance of comparative percentages of analyzed drugs over objection of defense counsel (TT. 172-175). (See also, 179-182). The witness went on to testify that in his opinion the exhibits found on the street and those confiscated in the house probably or possibly came from the same batch of mixed narcotics and dilutent (TT. 182).

CROSS EXAMINATION

Agent Mahon said he had been with the Narcotic Bureau about 1½ years (TT. 182). He has had no specialized training in Chemistry. He has a Bachelor of Arts Degree in Economics. He does not claim to be an expert in chemical analysis. All of his training and experience concerning narcotics has been with the Bureau of Narcotics and Dangerous Drugs. He had approximately three months schooling on drugs. His only knowledge of narcotic use and instruments used has been acquired from period of training and reading (TT. 183-188).

Mr. Mahon said he did not see the occupants of the Ford do anything wrong (TT. 197). He did not see the men

go in or come out of the address to be searched (TT. 189). He cannot say the packages brought back to the house were ever there before (TT. 190).

He said, at the time of the forced entry, they waited 15-30 seconds for the occupants inside to respond before taking action (TT. 198).

He did not remember asking defendant if he wanted a lawyer. Defendant would not sign a confession (TT. 201).

He can only say that probably the narcotics found in the street and that found in the house came from the same batch of mixed drugs (TT. 205). The total quantity of drugs found in the house was just a fraction over six (6) grams (TT. 206).

The government rested (TT. 208).

The defendant was about 15 minutes late arriving for trial. He explained that he was looking for a witness in his behalf. The Court found him to be in contempt and fined him $50.00 (TT. 212 and 213).

Defense Counsel moved for Directed Verdict of Acquittal as to both Counts in the Indictment. The Motions were denied (TT. 267-273).

A copy of the Indictment is attached to the Appendix.

DEFENSE WITNESSES

CHARLES F. MORROW

Mr. Morrow testified that on February 28, 1972, he was the owner of the 1970 Cadillac as described in the Affidavit for the Search Warrant (TT. 273-275). He verified defendant's proposed Exhibit 1 as being his true criminal record. His record was received in evidence as defendant's Exhibit No. 1 (TT. 276). He further testified that he has never been arrested in his lifetime for a narcotics related offense (TT. 275-276). Nor has he ever been con-

victed of a narcotics offense (TT. 276). He did testify on cross examination that at the time of one arrest, an officer mentioned drugs being on the premises but his actual arrest had nothing to do with drugs (TT. 278-279). Mr. Morrow's criminal record is being attached to the Appendix herein as Exhibit IV.

RAY M. DAWKINS

Mr. Dawkins testified that he is employed at Revere Copper and Brass Company. That he was owner of the 1965 Buick referred to in the Affidavit for the Search Warrant. That he visits the defendant's home frequently because they are brother-in-laws (TT. 285-287). At page 288, he was asked: (See also, TT. 287)

Q Have you ever been arrested *or* convicted of a criminal offense?

A No, I haven't.

SANDRA DAWKINS

Mrs. Dawkins testified that she is the wife of Ray M. Dawkins. She said she drove her husband's car to the defendant's home February 28, 1972, and her husband was not there (TT. 288-291).

HARDIE CHRISTOPHER, JR.

This witness is the 20 year old son of the defendant. He was living with his father at all times in question and was at home at the time the raid was conducted, February 29, 1972. He never heard an announcement at the door before the forced entry (TT. 291-292). He never heard his father say that there were narcotics in the house (TT. 295).

The trial Judge took over the cross examination of the witness and continued for about ten pages (TT. 296-307). The Assistant District Attorney announced that he was through questioning the witness and the Court again took over cross examination (TT. 308). Defense Counsel made the following objection (TT. 309):

> "MR. RICE: Your Honor, could the record show that throughout the trial the Court has cross examined certain witnesses and I want the record to indicate my objection to the Court cross examining witnesses.
>
> "THE COURT: To What?
>
> "MR. RICE: To the Court cross examining witnesses.
>
> "THE COURT: You did not object to my asking any questions until after I was through, and I asked very few questions".

HARDIE CHRISTOPHER, SR.

Testified that he had been a Bar Owner for the past 18 years (TT. 310). He works 18-20 hours per day in his business. He did not hear the officers knock on the door and announce their authority and purpose. He denied that the men brought into the house by the officers had previously been in his home. He denied that he ever made a sale of any Narcotics to "Dallas," and never told Agent Finnegan that he did (TT. 310-316). That he told the Agents that the money found in his home were receipts from his bar business. He had no knowledge of Narcotics being in his home (TT. 317).

He further testified that the Agents indicated that he know Defense Counsel had called, but if he cooperated with them, no attorney was necessary (TT. 320-321).

He denied that his car was ever at a Narcotic Distribution Center as alleged in the Affidavit for the Search Warrant

(TT. 326). That the car in question was registered to him but in fact belonged to his son-in-law who lived at the address spoken of.

The trial Judge commenced cross-examination of the witness (TT. 341-344).

Defense rested (TT. 348).

Defense Counsel renewed his Motions for Directed Verdict of Acquittal (TT. 348-350). Motions were denied.

Defense Counsel renewed Motion to Quash Search Warrant (TT. 349-350). Counsel argued that once it came to the Court's attention that incorrect or misleading facts were stated in the Affidavit for Search Warrant, it was the Court's duty to reconsider the validity of the Search Warrant on renewed Motion, citing *U. S.* v. *Upshaw*, 448 F. 2d 1218 (TT. 350, 351, 352, 379, 380). The Court considered the case presented and took the Motion under advisement (TT. 379-384). However, the Court never ruled on the Motion to Quash the Search Warrant.

The Court found the defendant guilty on both counts in the indictment. Defendant received a Sentence of five (5) years on each count to run concurrent plus a five-thousand ($5,000) dollar fine.

Defendant gave Notice of Appeal. He was let to five-thousand ($5,000) Cash Bail, Conditioned upon payment of the five-thousand ($5,000) dollar fine before release.

The Court of Appeals for the Sixth Circuit affirmed the Judgments of the trial Court by an Order June 14, 1973.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals for the Sixth Circuit in affirming the judgment of the Trial Court in this cause clearly conflicts with a prior decision of the Court of Appeals for the Fifth Circuit considering the same issue (U.S. v. UPSHAW, 448 F. 2d 1218; Cert. den. 405 U.S. 934; 92 S. Ct. 970; 30 L. Ed. 2d 810) where in the instant case the Trial Court refused to grant defense counsel's motion to reconsider a prior motion to quash the search warrant and suppress the evidence at trial after it was disclosed that facts related in the affidavit for the search warrant were incorrect or misleading to the extent that had the truth been known by the magistrate signing the warrant, the search warrant most probably would not have been issued; further, the Court must consider the use of tainted evidence by the Government at any stage of proceedings.

In *U.S.* v. *Upshaw, supra,* Defendant and others were involved in a counterfeit check ring. On June 24, 1968 several members of the group were arrested and, pursuant to a search warrant, a search was made of the premises of Davis' print shop which disclosed a large quantity of temporary Alabama driver permits bearing the same number as those used by the group as means of identification when passing the checks, and blank checks. Davis' motion to suppress evidence seized in the search, on grounds of lack of probable cause, was denied after hearing. Various seized items were admitted into evidence at trial.

The testimony at the hearing disclosed that some of the allegations in the Affidavit for the Search Warrant were erroneous or incorrect. The Court of Appeals for the

Fifth Circuit held that the trial Court erred in overruling Davis' Motion to suppress. The Court by note explains the basis for its holding at page 1222 as follows:

> "On the one hand, there is question whether Courts have the time and energy to review in a multitude of cases the magistrate's judgment of the affiant's credibility or his capacity for accuracy. In addition, it must be kept in mind that it is the magistrate, as an independent judicial officer, whose decision will govern whether liberty or privacy is to be invaded. Jones v. United States, 362 U.S. 257, 270-71, 80 S. Ct. 725, 736, 4 L. Ed. 2d 697, 708. And * * * it is not the after-the-fact procedure on motions to suppress evidence which stands in this scheme as the primary bulwark for the citizen's privacy. United States v. Halsey, supra. On the other hand, one can find support for factual challenge of an affidavit in the policy underlying the exclusionary rule which forbids evidence seized by federal and state officers in violation of the Fourth Amendment to be used *at trial in the federal and state Courts.* Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914); Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). *The policy of the rule is not to exclude unreliable evidence, but to deter — to compel respect for the constitutional guaranty in the only effective available way — by removing the incentive to disregard it.* Elkins v. United States, 364 U.S. 206, 217, 80 S. Ct. 1437, 4 L. Ed. 2d 1669, (1960)." Emphasis added.

The *Upshaw* case is so clearly in point with the facts and law of the instant case that not once did government counsel address himself to said case in his brief before the Sixth Circuit Court of Appeals. Likewise, after reading the *Upshaw* case during trial, the trial judge took the Motion to Quash the Search Warrant under advisement and never did make a ruling thereon. Considering the case, the trial Court said,

"The Court: This is a peculiar case. The Court goes on to say, among other things: 'It is not necessary in this case for us to reach the question of whether a defendant is entitled to a hearing to test the underlying factual validity of the affidavit on the basis of which a warrant has been issued (as opposed to the affidavit's sufficiency if taken as true). And, it is equally unnecessary to decide what preliminary requirements, if any, a defendant must meet after he requests a hearing in order to demonstrate that there is an authentic issue of fact which will justify such a hearing. These questions have been neither considered by the District Court nor briefed to us on appeal.' It goes on: 'In this instance the Court held a hearing, appropriately convened, on the issue of probable cause. We are called upon to review the consequences of that hearing, after the facts have come out. The evidence, fully explored at the hearing, revealed that what was said in the affidavit was in vital respects erroneous, and that the facts, when truly and correctly stated, would not support the issuance of a warrant.' Then the Court concludes: 'Once it came to the attention of the Court, from the testimony at the motion to suppress hearing, that evidence had been seized on the basis of statements of facts erroneously made by affiant which struck at the heart of the affidavit's showing of probable cause, the Court was required to grant the motion.' The Court goes on to say: 'The judicial system cannot be a party to the use of tainted evidence on the basis that, arguably, the defendant was not entitled to bring to the attention of the Court what the Court has come to know anyhow.' Do you have any authority on this, Mr. Ibershof, as to the right of the Court to go back in the face of the affidavit and when that must be done? Mr. Ibershof: Not on this precise issue. The only cases I was able to locate is the two cases I mentioned, the two Sixth Circuit problems. The Court: They are not on this problem. Mr. Ibershof: They are not on this problem but they do raise the rationale — The Court: (Interposing) : I think there will be cases

and I think there are that deal directly with the question of whether the factual allegations of the affidavit can be challenged. That is the number one question. That is the threshold question. If it can be challenged, when must that be done? Mr. Ibershof: Well, I would agree, first of all, that the factual allegations of an affidavit can be challenged, but — The Court: What is your authority for that? Mr. Ibershof: I have no case to cite but it is plain to me that, as I said before, if the allegations in the affidavit for the search warrant are a pack of lies, then that's something that the Court ought to inquire into. The Court: I know, but unless you have authority for these things — You don't just create these things from thin air. The question is: Is that by rule or case law or by what? Mr. Ibershof: I think Rule 41 (e) — The Court: This language in here would create some question about it, wouldn't it? Mr. Ibershof: Yes. The Court: This is a case of 1971. In other words, can you go back of the face of the affidavit? That is the threshold question. I am going to recess again for a few minutes. No, I think I will listen to your arguments. I will take this part of the matter under advisement and you may proceed to the arguments on the merits."

During cross examination at trial, Agent Finnegan, Affiant on the Affidavit for the Search Warrant, testified that he checked the Police Records of Charles F. Morrow and Ray Dawkins with the Detroit Police Department and found that Morrow's record included a Narcotic Violation as stated in the Affidavit, and Dawkins' record showed a Narcotics related arrest where drugs were found on his person or in his car (TT. 36, 37, 38, 61). However, he admitted that his investigation report stated only drug related arrests (TT. 39). This testimony was not objected to.

The Agent further testified that he did not personally observe defendant's car at the alleged Narcotics Distribu-

tion Center as alleged in paragraph two (2) of the Affidavit (TT. 53-54, 60). He admitted that he had no personal knowledge if Morrow or Dawkins were ever at defendant's home (TT. 60). The Agent was shown a copy of Charles Morrow's criminal record received from the Detroit Police Department that day (6-14-72) as defendant's proposed exhibit number 1 (TT. 62). The Court stopped the cross examination along these lines (TT. 63 and 64). This ruling was clearly erroneous, because once the witness had testified to facts concerning the Criminal records of Morrow and Dawkins, and about his observations as alleged in the Affidavit for the Search Warrant. Counsel had a right and duty to attack this witness' credibility to show that he was not worthy of belief. The Court ruled that the witness was being impeached on a collateral matter. This was incorrect because whether the witness had made false statements concerning any part of the case was relevant on the issue of his credibility is at issue.

During his proofs, defense counsel developed facts to show that Charles Morrow had no narcotic VIOLATIONS on his criminal record as alleged in paragraph three (3) of the Affidavit for the Search Warrant, and as testified by the Affiant during trial (TT. 273-279). Further, that he had never been arrested in connection with a drug offense (See also, D's Exh. 1).

As to Roy Dawkins, he had never been arrested *or* convicted of any criminal offense, and was gainfully employed at Revere Copper and Brass Company. Consequently, no criminal record could be obtained as an exhibit. Further, he is a brother-in-law of the defendant and has reason to visit defendant's home frequently (TT. 285-288). Dawkins' wife went on to testify that she knew for a fact that Dawkins was not at defendant's home 2-28-72; however, she was there with his car (TT. 288-291). These facts clearly re-

fute the sworn allegations of the agent in the Affidavit for the Search Warrant (See App. Exh. 1).

Further proofs developed that the vehicle mentioned in paragraph two (2) of the Affidavit was registered in defendant's name, but actually belonged to his son-in-law who lived at the address claimed to be a Narcotic distribution center of Jack Crawford. Although it is not as clear that the allegations in this paragraph are false as those of paragraphs 3 and 5, they are at least misleading in the sense that the paragraph is designed to give the impression that defendant was connected with a known narcotics distribution center (TT. 322-326). Defendant denied any knowledge of the allegations of paragraph one (1) (TT. 314).

In view of the foregoing proofs, defense counsel renewed his Motion to Quash the Search Warrant (TT. 349), citing *U.S.* v. *Upshaw*, 448 F. 2d 1218, as authority (TT. 384). However, the Court never did make a ruling thereon. We are considering his findings against the defendant a denial of the motion. We believe such denial was erroneous, as a matter of law.

Once it came to the Court's attention that matters in the Affidavit for the Search Warrant were false, incorrect or misleading the Court must act thereon. The Court cannot be a party to concealment of false or distorted facts that might have caused the Magistrate to act differently had he known the truth before signing the Warrant.

In *U.S.* v. *Upshaw, supra,* it was discovered at a subsequent suppression hearing that some of the facts in the Affidavit for the Search Warrant were either incorrect or erroneous. The trial Court overruled defendant's Motion to Suppress the evidence. The Court in reversing the conviction, stated as follows (on page 1222):

> "Once it came to the attention of the Court, from the testimony at the Motion to Suppress Hearing, that evidence had been seized on the basis of state-

> ments of facts erroneously made by the Affiant, which struck at the heart of the affidavit's showing of probable cause, the Court was required to grant the motion. The judicial system cannot be a party to the use of tainted evidence on the basis that, arguably, the defendant was not entitled to bring to the attention of the Court what the Court has come to know anyhow."
>
> (Note: Cert. Den. 405 U.S. 934, 92 S. Ct. 970, 30 L. Ed. 2d 810)

Government Counsel argued that the agent did not mean what was expressed in the Affidavit (TT. 372). However, it matters not what the agent meant in his own mind; but rather, what the Magistrate or other legal mind would understand the Affidavit to mean upon examination thereof.

It is clear that the Court and both Counsel understood the allegations in the affidavit, with reference to Morrow, to mean that the Agent checked his record and found a drug violation thereon. Such an allegation is clearly false. Also, as to Dawkins, any legal mind would have to conclude from what was said that the Agent checked his record and found thereon an arrest relating to drugs. The truth is that he has no record to check.

On pages 9 and 10 of the Motion Transcript, Government Counsel clearly expresses what he understood the affidavit to mean. He said as follows:

> "But, of course, the affidavit goes beyond that. It shows *a record check,* showing the defendant previously having been at a place which was a drug distribution center. There was surveillance, showing the defendant *entering* the premises, further, establishing that it was his place, and *reciting two narcotic violators* entering the premises and staying a short time."

Then on page 17 of the Motion Transcript, the Court said he understood paragraph two (2) of the Affidavit to mean that the defendant was seen entering the residence of a known drug dealer. Further, that he understood paragraph three (3) to refer to a criminal record with a DRUG VIOLATION, and paragraph five (5) to refer to a criminal record with a DRUG RELATED arrest. (See also TT. 372, 373, 374, 377, 378) The Court clearly indicates that he had doubts that the allegations of paragraph one (1) of the Affidavit standing alone was sufficient probable cause for issuance of the warrant (MT. 9). Everything else the Court said he understood the Affidavit to mean, except paragraph four (4), which is insignificant, was proven at the trial to be false. Accordingly, the Motion to Quash the Search Warrant and Suppress the evidence should have been granted.

2. The Trial Court erred in refusing to order disclosure of an informant who is not claimed to be reliable but merely "confidential" and said informant alleges to have seen approximately two (2) pounds of white powdery substance at Defendant's home that "Christopher" represented to be therein two (2) days before issuance of the search warrant, where in fact there are two (2) Hardie Christophers living at said address and the informant does not describe either.

Defense Counsel filed a Motion in advance of trial demanding that the identity of the informant be disclosed before trial so that proper investigation could be made of this witness in preparation for trial (MT. 7). The Court denies the Motion, stating as follows (MT. 18-19):

> "The motion to disclose the informant is also denied, because this is not the type of a case where the Gov-

ernment is relying upon the information supplied by a confidential informant as the basis for the evidence upon which the prosecution is based. As Mr. Abershof pointed out, this is not a case where the defendant is charged with selling to the informant, whose reliability would be a proper issue in the case. But here, the premises having been properly searched and the Agents having found what is alleged to be contraband material, the drugs described in the Indictment, the reliability of the informant is not in question in the substantive offense. For these reasons, there appears to be no reason at all for the Government being required to disclose the confidential informant. Therefore, that Motion is denied."

Appellant contends that this ruling was clearly erroneous, because the alleged confidential informant was an essential witness for the defense on the issue of who the possessor of suspected contraband was on February 27, 1972, as he describes no particular person, and the evidence clearly shows that there were two (2) Hardie Christophers residing at the address to be searched on said date. Since at the time of the search, no one on the premises had narcotics on their immediate person, it was important to know who the informant saw in possession 2-27-72 as bearing on the guilt or innocence of the defendant at trial, as he denied possession by pleading not guilty at arraignment. Denying the defendant this information denied him the right to build up a defense that might have exonerated him, because if the informant had testified that Hardie Christopher, Jr. was the possessor on 2-27-72, Counsel might successfully argue that any narcotics found on the premises 2-29-72 was possessed by the son without the knowledge of the father. The informer is a necessary witness at trial.

Although the factual situation is somewhat different, the principle of *Roviaro* v. *United States,* 353 U.S. 53, 60, 61, is applicable here where the Court said:

> "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause the privilege must give way."

In the instant case, the alleged informant does more than just relate facts and circumstances observed by him to establish probable cause, he relates a conversation he had with someone on the premises. He relates a name that may or may not refer to the defendant. In any event, defendant is entitled to confront that witness. In *Favre* v. *Henderson*, 318 F.Supp. 1384 (ED La. 1970), the Court reversed defendant's conviction where a police officer testified that he had arrested defendant on the basis of reliable information given to him by an undisclosed informant who had proved reliable in the past. The Court held that the defendant had a right to confront said witness. (See also, *People* v. *Harris*, 41 Mich. App. 389 (1972).)

Also, in the instant case, the Trial Court overlooked the fact that Count II of the Indictment charged the defendant with a Sale to one "Dallas." The evidence shows that "Dallas" was one of the five (5) persons arrested and released the next day. If "Dallas" is the informer, the defense of entrapment may be available.

Finally, the Affiant's credibility was at issue. The contents of the Affidavit are too incredible to believe. There is no reason to believe the Affiant was any more truthful about the allegations of paragraph one (1) than he was about paragraphs 2, 3 and 5, which were clearly incorrect. Also, it is unbelievable that an informant working with the Government would not have gotten a sample of what he saw on the premises.

In considering the question of requiring disclosures of an

informer, the Court in *State* v. *Texeira*, 433 P. 2d 593, 599 said:

> "In some cases, well-intentioned law enforcement officers may be overly zealous in attempting to protect the public against criminals and perhaps an officer occasionally may perjure himself. Doubtless this is a factor which the judge to consider [sic] in deciding whether he believes the officer's testimony and whether in his discretion, he should require disclosure of the informer's identity."
>
> (See *State* v. *Burnett*, 42 N. J. 389, 201 A.2d 46; *Glover* v. *State*, 251 N. E. 2d 814)

Accordingly, this Court is asked to correct the error of the lower Courts.

3. The Trial Court's frequent questioning of witnesses on matters of substance and credibility and becoming personally involved in presenting and connecting up evidence over objection of defense counsel seriously impaired the Defendant's right to a fair trial as guaranteed by the State and Federal Constitutions.

Appellant concedes that the trial Judge acts within his discretion when he questions witnesses to clear up matters that are unclear in his mind. This, the Judge must do to be able to make proper rulings and follow the evidence. However, a trial is an adversary proceeding and the Judge as an impartial arbiter acts improperly when he takes sides or interferes with counsel's presentation of evidence. This we believe to be even more prejudicial in a non-jury trial where he sits as both trier of the facts and law.

The instant case was a non-jury trial. The trial court asked at least eight (8) questions (TT. 98-99) and be-

came personally involved in assisting the Assistant U. S. Attorney at least five (5) times in presenting evidence where no proper foundation was laid (TT. 79, 80, 81, 82, 91). When the defendant's 20 year old son was being cross examined by the government's attorney, the Court took over the cross-examination and asked at least twenty-four (24) questions designed to impeach the witness (TT. 296-304, 307, 308). Finally, defense counsel objected to the Court's conduct (TT. 309). However, even after said objection, the Court proceeded to cross examine the defendant, asking at least thirteen (13) questions (TT. 329, 337, 340-344, 347).

In *People* v. *Wilder,* 160 N. W. 2d 749 (Mich.), the Court held: That the Action of trial judge in non-jury trial on conducting his own extensive examination of witnesses destroyed the adversary nature of the proceedings and thereby necessitated a New Trial. See also, *People* v. *Smith,* 159 N. W. 2d 174 (Mich.), where the Court said:

> "In a non-jury trial, it is reversible error for the judge to cross examine witnesses and the defendant in the manner of a prosecuting attorney. Such conduct evidences a prejudgment of the issues and prevents a fair trial." (See also, *U.S.* v. *Lanham,* 416 F. 2d 1140 (1969).)

It is worthy to note that at no time did the trial Judge cross examine any government witnesses. Moreover, the Court found defendant in Contempt of Court for being less than fifteen (15) minutes late for trial. Defendant explained that he tried to locate a witness before coming to Court (TT. 212-213).

Although the Court granted defense Counsel's Motion to have a local analysis of the exhibits, the Court's subsequent refusal to issue an Order, note or letter for the benefit of the Scientific Lab was tantamount to a denial; there-

by denying the defendant the right to inspect and examine the evidence against him (TT. 208-211, 213-223).

We do not believe that the appearance of justice was ever present throughout the trial of this Cause and the defendant was thereby denied a fair trial. *Mooney* v. *Holohan,* 294 U.S. 103.

4. The Trial Court erred in receiving Government exhibits 6(a), (b), (c); 7(a), (b), (c); 8(a), (b), (c); 9(a), (b), (c); 10(a), (b), (c); 11(a), (b), (c), over objection of defense counsel where there was no tracing of the complete chain of custody and control over the evidence from the time of seizure to the time of trial.

The Chemist from Chicago testified that he had nothing to do with the actual receipt of the package when first received at the laboratory. The exhibits were removed from the evidence vault by the lab technician. The Court sustained an objection to this testimony (TT. 66-67). He went on to testify that one envelope for each exhibit was sealed by someone else (TT. 70-71). Further, that he did not see the lab technician remove the exhibits from the vault, and cannot say they are the same (TT. 76). He said he first saw the exhibits after they were removed from the evidence vault 3-2-72 (TT. 78, 87, 88).

Unless defendant waived the requirement, he was entitled to have the chain of custody and control over the evidence seized, in connection with his case, established beyond a reasonable doubt. Failure to call the lab technician to connect up this missing link, caused the chain to remain broken. Accordingly, the trial Court erred in denying defendant's Motion for Directed Verdict of Acquittal, which should be corrected by this Court.

5. The Decision and Findings of the Trial Court are clearly erroneous and against the great weight of evidence where the Corpus Delicti of Count II could only be established by an alleged admission by the Defendant and there was no other clear or positive corroborating evidence in support thereof.

In view of what is stated in Arguments 1 and 4, we believe the alleged admissions of the defendant should have been excluded under the doctrine announced in *Wong Sun* v. *U.S.*, 371 U.S. 471. Also, suppression of the evidence as suggested in those arguments would eliminate the Possession charged in Count I of the Indictment.

In summary, the only evidence presented by the Government to sustain their burden of proof as to Count II, Sale of Heroin, was an alleged admission that Agent Finnegan said the defendant made to him to the effect that defendant sold the packages found in the street to "Dallas" for $200.00 each. Dallas denied this and was released without charge the next day. Defendant also denied having made such an admission at trial. Defense counsel objected to any such admissions being used to establish the Corpus Delicti of the Charge of Sale.

Over objection, the Court permitted Agent Mahon to testify that the nearness in figure percentages of the substances analyzed indicated that POSSIBLY all the packages in evidence came from the same batch of mixed contraband. The agent was not properly qualified to render such an opinion. Accordingly, this testimony should not have been allowed. Also, the Agent's testimony was in dispute with that of the qualified chemist, in this respect, who testified that the variance does not normally exceed 6%. However, the Agent said the variance could exceed 10%.

Of further interest, the Chemist testified that one of

the exhibits brought in from the street was a mixture of heroin, lactose and mannitol containing 36.4% heroin. However, none of the exhibits found in the house contained mannitol, and consisted of 30.1% heroin, which was clearly out of the variance range of guessing what might have come from the same batch (TT. 96-101).

The Court permitted Agent Finnegan to testify, over objection, that he had seen other envelopes at defendant's home, similar in appearance to those containing the contraband exhibits. This ruling was clearly erroneous as defendant was entitled to the best evidence in Court for examination and inspection.

The Court, in his decision, considered the proofs as corroborating evidence of a sale to Dallas. This was clearly erroneous. This being a criminal case, the proofs would have to be more specific, clear and convincing. Each of the corroborating facts were too speculative.

In any event, before we get to the question of corroboration, the Corpus Delicti must first be established. It is an elementary principle of law that the Corpus Delicti of a crime cannot be established by the extra judicial confession or admission of an accused.

Gillespie Criminal Law, Sec. 23, 2d Ed.
People v. *Lee*, 231 Mich. 607

See also, *People* v. *Blakes*, 382 Mich. 570, 170 N. W. 2d 832 where in prosecution for conspiracy to violate the gambling laws, corpus delicti could not be proved by defendant's statement to police during search of another's apartment that the betting records they were looking for were in a certain place in the apartment, where such records were in fact found.

The decision and findings of the trial court contrary to these principles of law are clearly erroneous.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WILFRED C. RICE

Attorney for Petitioner
2436 Guardian Building
Detroit, Michigan 48226
965-7962

APPENDIX

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN - SOUTHERN DIVISION

UNITED STATES OF AMERICA

vs.

2244 EDISON STREET, DETROIT, MICHIGAN

AFFIDAVIT FOR SEARCH WARRANT

BEFORE Paul J. Komives, Detroit, Michigan. The under signed being duly sworn deposes and says:

That he has reason to believe that on the premises known as 2244 Edison Street, Detroit, Michigan, a single family, 3-story, red-gray brick dwelling having the number 2244 on the front of the residence, being the 5th house west of the intersection of 14th and Edison, on the north side, in the Eastern District of Michigan there is now being concealed certain property, namely controlled substances, and evidence of sales transactions and dealings in connection with controlled substances, which are held in violation of Title 21, Section 841 (a) (1), United States Code.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

1. On or about February 27, 1972, a confidential informant who has provided affiant with information concerning criminal activity on more than 4 occasions during the past 2½ years, and as recently as one month

ago, which information has resulted in the indictment of over 4 individuals in drug related cases, told affiant that on or about February 27, 1972, the informant entered the premises to be searched which was represented to be the residence of HARDIE CHRISTOPHER, and at that time observed approximately two (2) pounds of a white powdery substance which CHRISTOPHER represented to the informant to be heroin, a Schedule I Narcotic Drug Controlled Substance.

(continued on attached sheet)

Gerard Finnegan
Special Agent - Bureau of Narcotics and Dangerous Drugs

.....
Signature of Affiant

Sworn to before me, and subscribed in my presence, February 29, 1972.

William C. Ibershof, 226-3110

Affidavit for Search Warrant
February 29, 1972
Page 2

For: 2244 Edison Street, Detroit, Michigan

2. After being advised of the above, affiant conducted a criminal record check and learned that HARDIE CHRISTOPHER is on file with the Detroit Police Department, #229436, and has a criminal record and is currently wanted by the Detroit Police Department for violation of probation (non-support). Further, HARDIE CHRISTOPHER is on file with the Bureau

of Narcotics and Dangerous Drugs, in that on or about July 25, 1971, BNDD surveillance agents observed a vehicle registered to HARDIE CHRISTOPHER parked at 15880 Steel Street, Detroit, which residence, at that time, was known to be a narcotics distribution center of JACK CRAWFORD, a known and documented drug dealer.

3. On February 28, 1972, affiant and special agent Mahon, BNDD, conducted surveillance on the residence to be searched, and observed a person fitting the physical description of HARDIE CHRISTOPHER enter the premises to be searched. Continued surveillance disclosed that on February 28, 1972, a negro male was observed to arrive at the residence to be searched in a 1970 black Cadillac, Michigan License KSV 514, and enter the premises. After a short period of time, the same individual left the residence and the area via the same vehicle. That vehicle lists to CHARLES F. MORROW, 5056 Tireman Street, Detroit, who has a criminal record and reputation with the Detroit Police Department, which record includes a narcotics violation. The short period of time that the aforesaid individual was inside the premises indicated a possible narcotics transaction taking place.

4. A Detroit Edison utility check on February 28, 1972, revealed that HARDIE CHRISTOPHER is paying the utilities at 2244 Edison Street, Detroit, Michigan; and Michigan Bell Telephone Company records indicate that the telephone at the premises to be searched is registered to HARDIE CHRISTOPHER.

5. On February 28, 1972, at approximately 7:30 P.M., affiant and BNDD Special Agent Mahon, observed a negro male arrive via automobile at 2244 Edison Street

and enter. After a short while, the individual left via the same car, a 1965 Buick bearing Michigan License #KTF 389, which vehicle is registered to ROY M. DAWKINS who has a criminal record which includes a drug related arrest.

.....

Gerard Finnegan
Special Agent
Bureau of Narcotics and Dangerous Drugs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INDICTMENT NO. 46952
Vio: Title 21, Section 841(a)(1), U.S.C.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARDIE CHRISTOPHER,
Defendant.

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

That on or about February 29, 1972, in the Eastern District of Michigan, HARDIE CHRISTOPHER, defendant herein, did knowingly and unlawfully possess with intent to distribute approximately 4.5 grams of heroin, a Schedule I Narcotic Drug Controlled Substance; in violation of Title 21, Section 841 (a) (1), United States Code.

COUNT TWO

That on or about February 29, 1972, in the Eastern District of Michigan, HARDIE CHRISTOPHER, defendant herein, did knowingly and unlawfully sell and distribute approximately 8 grams of heroin, a Schedule I Narcotic Drug Controlled Substance, to one Quincy Sil-

ver; in violation of Title 21, Section 841 (a) (1), United States Code.

A TRUE BILL

.....
Foreman

RALPH B. GUY, JR.
United States Attorney

WILLIAM C. IBERSHOF
Assistant United States Attorney

Dated: March 23, 1972

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INDICTMENT NO. 46952

Vio: Title 21, Section 841(a)(1), U.S.C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARDIE CHRISTOPHER,

Defendant.

MOTION TO SUPPRESS EVIDENCE & QUASH SEARCH WARRANT

MOTION FOR DISCLOSURE OF INFORMANT OR DISMISSAL

MOTION TO SUPPRESS ALLEGED ADMISSION

Defendant, by his attorney, WILFRED C. RICE, Moves this Honorable Court to quash the search warrant issued in this cause and suppress the evidence seized as a result thereof, and/or Order the Government to disclose the identity and particulars concerning the informant in this cause for the following reasons:

1. That this cause was initiated on a search warrant, a copy of the affidavit for said search warrant is attached hereto and made a part thereof.

2. That the search warrant in this cause was the sole basis of the search and seizure precipitating the complaint and subsequent indictment in this cause.

3. That the search warrant in this cause was not issued pursuant to sufficient probable cause as required by Rule 41 (c) U.S.C.A. and federal cases construing said rule.

4. That paragraph (1) of the affidavit for the search recites a hearsay admission of the Defendant as a basis for believing that a crime had been committed on a prior date, said information being related by an un-named informant; that said affidavit does not relate unusual facts that could support a reasonable belief that a crime was being committed at 2244 Edison, Detroit, Michigan on February 29, 1972.

5. That disclosure of the informant, in this cause, is necessary to afford the defense an opportunity to investigate said witness and the truth of the allegations he allegedly made, as the affidavit for the search warrant is not based upon personal knowledge of the affiant or informant; but rather, an alleged hearsay admission by the Defendant.

6. That the alleged admission of sale by the Defendant recited in the complaint is inadmissible as substance to makeup the corpus delicti and if made, not made after proper Miranda warnings and, therefore, subject to the Federal Exclusionary Doctrine.

WHEREFORE, Defendant prays for relief.

.....

WILFRED C. RICE
Attorney for Defendant
2436 Guardian Building
Detroit, Michigan 48226
965-7962

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

On this .... day of May, 1972, before me personally appeared the above named WILFRED C. RICE, and made oath that he has read the foregoing Motions by him subscribed and knows the contents thereof and that the same is true of his own knowledge, except as to matters which are therein stated to be his information and belief and as to those matters, he believes them to be true.

.....
Notary Public, Wayne County, Mich.
My Commission Expires: .....

[CAPTION OMITTED]

NOTICE OF HEARING

TO: RALPH B. GUY, JR., ESQ.
817 Federal Building
Detroit, Michigan 48226

PLEASE TAKE NOTICE, that on the .... day of ....., 1972, the attached Motions will come on for Hearing in the United States District Court in the City of Detroit, Michigan, at .. O'clock of said date or as soon thereafter as counsel may be Heard.

.....
WILFRED C. RICE
Attorney for Defendant
2436 Guardian Building
Detroit, Michigan 48226
965-7962

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INDICTMENT NO. 46952
Vio: Title 21, Section 841(a)(1), U.S.C.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARDIE CHRISTOPHER,
Defendant.

BRIEF IN SUPPORT OF MOTION TO QUASH SEARCH WARRANT AND SUPPRESS EVIDENCE, DISCLOSURE OF INFORMANT OR DISMISSAL AND/OR SUPPRESSION OF ALLEGED ADMISSION

STATEMENT OF QUESTIONS INVOLVED

1. Is the affidavit supporting the Search Warrant, in this cause, insufficient in substance to support the issuance of the Search Warrant and thereby nullifying the subsequent Search and Seizure requiring Suppression of evidence seized?

Defendant says the answer is, "Yes."

2. Where the source of the probable cause alleged in a Search Warrant is hearsay information and the defendant claims that identity of the informant is imperative to adequate preparation for trial, should the Court require disclosure of the informant or dismissal of the case?

Defendant says the answer is, "Yes."

3. Where an alleged admission of a crime follows illegal conduct of the police, should the Court follow the Federal Exclusionary Doctrine and Suppress said admission?

Defendant says the answer is, "Yes."

STATEMENT OF MATERIAL FACTS

This case involves a search made pursuant to a search warrant issued by the Federal Magistrate on affidavit of Special Agent Gerard Finnegan, Bureau of Narcotics and Dangerous Drugs. The search of the Defendant's premises was made in execution of the Search Warrant.

Paragraph (1) of the affidavit for Search Warrant recites that a confidential reliable informant told the affiant that he (informant) was at the defendant's home on 2-27-72 and saw approximately two pounds of white powdery substance represented to be heroin by the defendant.

Paragraph (2) of the affidavit recites that the defendant is wanted by the Detroit Police Department for Probation Violation on a non-support conviction. That his car was parked at a place known to them to be a narcotics distribution center 7-25-71.

Paragraph (3) of the affidavit recites that one, Charles F. Morrow, who has a conviction for a narcotics violation, with the Detroit Police Department, was seen to enter the defendant's home, stay a short time and leave 2-28-72.

Paragraph (5) of the affidavit recites that one, Roy M. Dawkins who has had a drug related arrest, enter the defendant's home and leave after a short while.

On February 29, 1972, the agents armed with a search warrant, proceeded to the defendant's home. As they approached said address, they met some unknown persons a short distance away from the house, one of said persons

three something away. The agents allege in their complaint that defendant admitted selling 11 grams of heroin to an un-named party.

ARGUMENT

Arguments will run chronologically with questions submitted.

I. Rule 41 (b) Federal Rules of Criminal Procedure sets forth the grounds for issuance of a Search Warrant, which are as follows:

PROPERTY

(a) stolen or embezzled in violation of the laws of the U. S.

(b) designed or intended for use or which is or has been used as the means of committing a criminal offense.

(c) possessed, controlled or designed or intended for use or which is or has been used in violation of 18 U.S.C.A. Sec. 957. (Possession of property in aid of foreign government).

Rule 41 (c) Federal Rules of Criminal Procedure directs that the wararnt shall issue only on affidavit sworn to and establishing the grounds for issuing the warrant. If the officer "is satisfied that grounds for the application exist, he shall issue a warrant identifying the property and naming the person or place to be searched." It shall state the grounds or probable cause for its issuance.

Aguilar v. *Texas,* 378 U.S. 108

The search and seizure in the instant case must stand or fall on the search warrant and the execution thereof,

because said search was made on no other basis. Consequently, an examination of the four corners of the Search Warrant must be made. An examination of the Affidavit for the Search Warrant, in this case, along with controlling law fails to disclose sufficient facts amounting to probable cause for issuance of same.

Jones v. *U. S.*, 362 U.S. 362 U.S. 257
Spinelli v. *U. S.*, 393 U.S. 410
Durham v. *U. S.*, 403 F. 2d 190
People v. *Hendricks*, 25 N.Y. 2d 129
People v. *Wheatman*, 304 N.Y.S. 2d 904
People v. *Ryerson*, 305 N.Y.S. 2d 91
Bean v. *State*, 436 P. 2d 678

2. In the instant case, the alleged knowledge of contraband being on the defendant's premises 2-27-72 is a statement by the informant to the affiant that defendant said the powdery substance was heroin. The affidavit does not recite any facts other than this that contraband was ever seen at defendant's home. There is no claim of a prior sale or distribution.

The credibility and reliability of the informant is obviously a serious consideration at the suppression hearing and at trial. There exists a particularized need to know the identity and other particulars concerning said informant. Defendant is entitled to such information as a matter of law.

Rovario v. *U. S.*, 353 U.S. 53
State v. *Texeira*, 433 P. 2d 593
People v. *Sessin*, 439 P. 2d 321
Clover v. *Indiana*, 251 N.E. 2d 814

3. The alleged admission of having made a sale to one, Quincy Silver, by the defendant, as the basis for the charge

of Sale of Narcotics in the Indictment, is improper, because the Corpus Delicti of a crime must be established independent of an admission or confession.

People v. *Blakes,* 382 Mich. 570
People v. *Barron,* 381 Mich. 421
People v. *Zwierkowski,* 368 Mich. 56
People v. *Asta,* 337 Mich. 590

In any event, we believe that the alleged admission, if made, followed illegal conduct on the part of the officers in being on the Defendant's premises with a void warrant and improperly executing same. Therefore, the derivative evidence rule is applicable.

Wong-Sun v. *U. S.,* 371 U.S. 471
Fahy v. *U. S.,* 375 U.S. 85
Silverthorne Lumber Co. v. *U. S.,* 251 U.S. 385

WHEREFORE, Defendant prays the Court to grant the relief prayed for.

.....

WILFRED C. RICE
Attorney for Defendant
2436 Guardian Building
Detroit, Michigan 48226
965-7962

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CRIMINAL NO. 46952

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARDIE CHRISTOPHER,
Defendant.

RESPONSE TO MOTIONS TO SUPPRESS EVIDENCE, COMPEL DISCLOSURE OF INFORMANT AND SUPPRESS ADMISSIONS OF DEFENDANT

The Government shall respond to the defendant's Motions in the order in which such Motions have been presented for decision.

I

THE AFFIDAVIT FOR THE SEARCH WARRANT WAS CONSTITUTIONALLY SUFFICIENT

The affidavit for the search warrant issued in the instance case clearly contains sufficient facts to show probable cause to search the residence at 2244 Edison Street, Detroit, Michigan for controlled substances and evidence of dealings in connection therewith. Though founded on the tip of a confidential informant, the affidavit provided sufficient information as to the activities of such informant to allow the Magistrate to make a determination that he

was reliable. In addition the affidavit sets forth the investigation undertaken by agents of the Bureau of Narcotics and Dangerous Drugs which independently corroborates the confidential tip. BNDD agents determined that Hardie Christopher in fact lived at the address to be searched, that he associated with a well-known drug dealer and that known drug violators visited Christopher at the residence to be searched.

Since this independent investigation provided a substantial basis for crediting the hearsay presented the agents by the informant, the warrant was properly issued.

The controlling law in the circumstance is clearly set forth by the United States Supreme Court in *United States* v. *Ventresca,* 380 U.S. 102, 105-109 (1964):

> "Thus hearsay may be the basis for issuance of the warrant" so long as there [is] a substantial basis for crediting the hearsay. *Jones* v. *United States, supra,* at 272. And, in Aguilar we recognized that "an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant", so long as the magistrate is "informed of some of the underlying circumstances" supporting the affiant's conclusions and his belief that any informant involved "whose identity need not be disclosed . . . was 'credible' or his information 'reliable.'" *Aguilar* v. *Texas, supra,* at 114.
>
> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion." 380 U.S. at 108.

As indicated by the *Ventresca* court, hearsay information from an unnamed informant can be the basis of a warrant so long as there is some independent confirmation of the information provided. See *Aguilar* v. *Texas*, 378 U.S. 108, 114 (1964), and *Spinelli* v. *United States*, 393 U.S. 410, 415 (1969). See also *Drapper* v. *United States*, 358 U.S. 307 (1959). (Hearsay supplied by an unnamed informant collaborated by independent investigation provided a basis for an arrest without warrant for possession of narcotics) See also the following authority from the 6th Circuit following the foregoing rationale. *United States* v. *Jenson*, 432 F. 2d 861 (6th Cir., 1970); *United States* v. *Gosser*, 339 F. 2d 102 (6th Cir., 1964); and *United States* v. *Eisener*, 297 F. 2d 595 (6th Cir., 1962).

II

THE GOVERNMENT NEED NOT DISCLOSE THE NAME OF THE INFORMANT REFERENCED IN THE AFFIDAVIT FOR SEARCH WARRANT

The defendant's arguments that the basis of the informant's information must be disclosed and that his identity revealed to allow a determination of the validity of the search do not pass muster. Here the Government produced independent verification of the information provided by the informant. The informant's signature does not appear on the affidavit, nor did he present himself before the Magistrate and provide the Magistrate with any information at the time the search warrant was issued. As such, the identity of the informant and the facts the informant relied on for his information are not relevant or material. Rather the Magistrate's determination was based upon the affiant's, Agent Finnegan, conclusions and

the underlying circumstances – the product of the BNDD investigation – supporting Agent Finnegan's belief. Accordingly there is no basis to warrant disclosure of the informant's identity. See *McCray* v. *Illinois,* 386 U.S. 300 (1966), *Jones* v. *United States,* 362 U.S. 257, 271-272 (1960) and *Rugendorf* v. *United States,* 376 U.S. 528, 533 (1964).

III

THE ADMISSIONS OF THE DEFENDANT AFTER HE WAS ARRESTED MAY BE PROPERLY ADMITTED

The agent will produce testimony at time of the suppression hearing to demonstrate to the satisfaction of the Court that at the time the defendant was arrested he was fully advised of his constitutional rights by agents of the Bureau of Narcotics and Dangerous Drugs and that thereafter any incriminating statements he made were freely and voluntarily made.

For the foregoing reasons the Government respectfully requests that the defendant's Motions be denied.

Respectfully submitted,

RALPH B. GUY, JR.
United States Attorney

/s/ Robert P. Hurlbert

ROBERT P. HURLBERT
Assistant U. S. Attorney

Dated: May 19, 1972

49

Criminal Record of Charles Fisher Morrow

EXHIBIT VI

CRIMINAL RECORD

DETROIT POLICE DEPARTMENT

OUR NUMBER 166333

NAME Charles Fisher Morrow (B)

F.B.I. NO.

M.S.B. NO.

ALIAS

Contributor	Name and Number	Date	Charge	Disposition
12-9-57 cmk				
D,Det.,Mich.	Charles F. Morrow #166333	10-6-53	Inv. RA	10-7-53- Dis, no case
"	"	11-30-53	Inv. Larc in st	12-1-53- Dis, no case
"	"	7-16-54	Inv. UDAA	7-16-54- Dis, no case
"	"	10-9-57	Fel Assault	12-20-57, 2 years prob $50 cost
"	"	12-11-57	Traff Warr	12-11-57, $30 or 5 das WCJ
"	"	10-19-60	Traffic Warr	10-20-60, $40 fine
"	"	12-6-60	Eng Ill Occ	12-7-60, $25 or 30 days DHC
"	"	11-19-60	Larc fr Auto	2-1-61, Conv: Att Larc fr Mtr Vehicle 2 yrs prob., $100 costs
"	"	1-16-62	Traffic Warrant	1-17-62, $15 Fine
"	"	5-21-62	Eng Ill Occ	5-22-62, $25 or 30 days DHC
"	"	9-9-62	Aslt & Btry	10-2-62, 1 year Prob & $100 Cost
"	"	8-11-63	Loit Pl Ill Occ	8-12-63, 10 days WCJa

MASTER RECORD MUST

DEFENDANT'S EXHIBIT 1 6-13-72. P.D.D.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INDICTMENT NO. 46952
Vio: Title 21, Section 841(a)(1), U.S.C.

A TRUE COPY
Frederick W. Johnson, Clerk

By /s/ Josephine Williams
Deputy Clerk

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARDIE CHRISTOPHER,
Defendant.

ORDER SETTING BAIL ON APPEAL

At a session of said Court held in the Federal Building, Detroit, Michigan on September 19, 1972

PRESENT: HONRABLE RALPH M. FREEMAN, DISTRICT JUDGE

Upon reading and filing the Emergency Application for Bail Pending Appeal filed by the Defendant in this cause and the Court being fully advised in the premises, after having heard the arguments of counsel in support thereof and in opposition thereto and on the further assurance of

defense counsel that he will personally instruct Defendant not to violate any criminal laws of the United States, any state or municipality, now Therefore,

IT IS ORDERED that the Defendant, HARDIE CHRISTOPHER, shall be released on a Five Thousand Dollar ($5,000.00) cash or surety bond furnished in this Court; provided, the Five Thousand Dollar ($5,000.00) fine imposed by the Court in the sentence shall have first been paid into Court.

IT IS a condition of said bond that all acts required to be performed in perfecting the appeal in this cause shall be diligently pursued with all due dispatch.

IT IS a further condition of said bond that the Defendant shall not violate any laws of the United States, any state or municipality while free on this bond.

IT IS intended by this Court that the conditions set forth herein be considered by the Appellate Court on a Motion for Revocation of bond if such a Motion becomes necessary and is brought before said Court while the Appeal in this cause is pending and the Defendant remains free on this bond.

RALPH M. FREEMAN
District Judge

Approved As To Form:

.....
Assistant United States Attorney

NO. 72-2096

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

vs.

HARDIE CHRISTOPHER,
Defendant-Appellant

ORDER
(Filed June 14, 1973)

BEFORE: WEICK and MC CREE, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

The appeal from a non-jury conviction of two counts of violation of 21 U.S.C. §841 (a) (1), unlawful possession and sale of heroin, having come on to be heard on briefs and oral argument, upon consideration, it is determined that no error was committed in denying the motion to suppress the evidence seized pursuant to a search warrant; that no error was committed in refusing to require the disclosure of the identity of the informant upon whose information the affidavit for the search warrant was based; that no error was committed by the court in its questioning of witnesses or in the admission of evidence, all of which amply supports the verdict of guilty. Accordingly, the judgment is affirmed.

Entered by order of the court

/s/ JAMES A. HIGGINS
Clerk

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
OCT 10 1973

No. 73-240

In the Supreme Court of the United States

OCTOBER TERM, 1973

HARDIE CHRISTOPHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
JEROME M. FEIT,
JUDITH A. METZNER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

Page

Opinion below 1
Jurisdiction 1
Questions presented 1
Statement 2
Argument 3
Conclusion 10

CITATIONS

Cases:

Canal Zone v. *Risbrook*, 454 F. 2d 725 6
Gallego v. *United States*, 276 F. 2d 914 7
Hansford v. *United States*, 303 F. 2d 219 6
Jones v. *United States*, 362 U.S. 257 ..... 3-4, 5
McCray v. *Illinois*, 386 U.S. 300 ..... 5, 6
Nardone v. *United States*, 308 U.S. 338 4
Opper v. *United States*, 348 U.S. 84 8
United States v. *Carter*, 326 F. 2d 351 6
United States v. *De Larosa*, 450 F. 2d 1057, certiorari denied *sub nom. Baskin* v. *United States*, 405 U.S. 927 7
United States v. *Graham*, 464 F. 2d 1073 7
United States v. *Harris*, 403 U.S. 573 5
United States v. *McFadden*, 458 F. 2d 440, certiorari denied, 410 U.S. 911 7
United States v. *Mehciz*, 437 F. 2d 145, certiorari denied, 402 U.S. 974 6
United States v. *Robinson*, 447 F. 2d 1215 7
United States v. *Rodrigues*, 433 F. 2d 760, certiorari denied, 401 U.S. 943 6
United States v. *Shameia*, 464 F. 2d 629, certiorari denied, 409 U.S. 1076 6
United States v. *Upshaw*, 448 F. 2d 1218, certiorari denied, 405 U.S. 934 ..... 4, 5

Page

Statutes and rule:

18 U.S.C. 4208(a)(2) 2
21 U.S.C. 841(a)(1) 2
Rule 41(e), Federal Rules of Criminal Procedure .. 3

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-240

HARDIE CHRISTOPHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1973. An untimely application for an extension of time within which to file the petition for a writ of certiorari was returned by the Court. The petition was filed on August 4, 1973, and is untimely under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing at trial to reconsider its denial of a pretrial motion to suppress

evidence and to order disclosure of the identity of a government informant.

2. Whether the government failed to prove the chain of custody of physical evidence.

3. Whether petitioner was convicted solely on the basis of his uncorroborated, extrajudicial admissions.

4. Whether the conduct of the trial judge deprived petitioner of a fair trial.

STATEMENT

After a non-jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on a two-count indictment charging the unlawful possession of heroin with intent to distribute, and a sale of heroin to one Quincy Silver, in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2), and a fine of $5,000. The court of appeals affirmed by order (Pet. App. 53).

Petitioner was arrested during a search of his home, pursuant to a search warrant, which resulted in the discovery of two packages of heroin in prescription envelopes, a quantity of empty prescription envelopes, and measuring paraphernalia (Tr. 12, 20, 22, 28). Immediately prior to the search, surveilling officers observed four men in an automobile parked directly across the street from petitioner's house (Tr. 10). The car sped away after the officers proceeded to execute the search warrant. Following a chase, during which the occupants of the car threw two packages out of the window, the occupants were apprehended and the packages retrieved. Confronted at his home

with these packages, petitioner identified them as two ounces of heroin, which he had just sold to "Dallas" (Quincy "Dallas" Silver), one of the occupants of the automobile (Tr. 15-16). The heroin was packaged similarly and was approximately equal in purity to that found in petitioner's home (Tr. 19, 96-97). In addition, petitioner told the officers that a large amount of cash found in his home represented the proceeds of "dealing" (Tr. 14).

ARGUMENT

1. Petitioner contends that the district court improperly refused to consider at trial renewed objections to the search warrant, the validity of which had been sustained at a pretrial hearing. At the hearing, two weeks prior to trial, petitioner had argued, without submitting any supporting evidence, that the warrant application (Pet. App. 30-33) was insufficient on its face, and that it failed to establish the reliability of the unnamed informant. Petitioner also contended that the informant's identity should have been disclosed (Transcript of May 30, 1972, pp. 5-7). In denying the motions, the court found the affidavit sufficient and ruled that the informant's identity need not be disclosed, since his statements were not probative of petitioner's guilt of the offense charged (*id.* at 16-18).

At trial, for the first time, petitioner sought to attack the accuracy of the allegations contained in the search warrant application, and he here contends that the trial court erred in declining to entertain such a challenge. Under Rule 41(e) of the Federal Rules of Criminal Procedure, petitioner was required to raise in the pretrial proceeding any grounds known to him for the suppression of evidence obtained pursuant to the search warrant. *Jones* v. *United States,* 362

U.S. 257, 264; see also *Nardone* v. *United States*, 308 U.S. 338, 342. Since petitioner failed at the pretrial hearing to present evidence challenging the accuracy of the affidavit on the grounds pressed at trial, and since he has not alleged here or below that the claimed inaccuracies were unknown to him prior to trial, he must be deemed to have waived his objections.

In any event, petitioner has not shown any inaccuracy in the application. It is petitioner's contention (Pet. 17-18) that the affidavit erroneously states (Pet. App. 32-33) that two persons whose automobiles were seen near petitioner's house had drug-related arrests, and that the affiant-officer had personally witnessed various incidents related in the affidavit. However, the trial testimony of the affiant, Agent Finnegan of the Bureau of Narcotics and Dangerous Drugs ("BNDD"), casts no doubt on the trustworthiness of statements in the warrant application. The Agent maintained on cross-examination that he had personally checked the criminal records of the two persons named in the affidavit, and that drug-related arrests of each were on file with local police (Tr. 38-39, 61-63). He also pointed out that the affidavit did not allege that he, personally, had witnessed all of the events described (Tr. 60). Moreover, the truth of one of the challenged allegations was corroborated by the testimony of a defense witness (Tr. 276-279).[1]

---

[1] *United States* v. *Upshaw*, 448 F. 2d 1218 (C.A. 5), certiorari denied, 405 U.S. 934, upon which petitioner relies, does not support his position. In *Upshaw*, it was established at a pretrial hearing that the affidavit was in all material respects erroneous, leaving only the affiant's belief that a crime was being committed. The court of appeals did not decide whether the defendants were entitled to a hearing on the truth of their allegations, but merely stated that a suppression motion was improperly denied where

Petitioner also complains that the affidavit fails to recite that the undisclosed informant was "reliable". It is unnecessary, however, for the affiant to state that his source is "reliable" or "credible", as long as the affidavit provides a basis for the magistrate's conclusion that the information is worthy of belief. *United States* v. *Harris,* 403 U.S. 573, 579-580. The affidavit in the instant case asserted that the affiant had received information from the informant on "more than 4 occasions during the past 2 1/2 years, and as recently as one month ago, which information has resulted in the indictment of over 4 individuals in drug related cases" (Pet. App. 30-31). On these facts, the magistrate was justified in believing the information presented in the instant application to have a reliable source.

Petitioner, moreover, was not entitled to disclosure of the identity of the informant whose statements to Agent Finnegan furnished the primary showing of probable cause in the warrant application. It is settled that creditable hearsay statements may be used in an affidavit for a warrant if they are sufficient to support a magistrate's conclusion that probable cause exists, and in such circumstances, the identity of the informant need not be disclosed. *Jones* v. *United States, supra,* 362 U.S. at 269-272; see *McCray* v. *Illinois,* 386 U.S. 300.

The reasons advanced by petitioner to compel disclosure of the informant, in any case, are not persuasive. The fact that the warrant application was based on the informant's advice that "Hardie Christopher"

---

the court was made aware at a pretrial hearing that errors in the affidavit "struck at the heart of the affidavit's showing of probable cause." *Id.* at 1222.

had been in possession of two pounds of heroin does not justify questioning the informant as to which "Hardie Christopher" was meant. The application was for a warrant to search the premises, not to arrest an individual, and it is therefore immaterial who was in possession of narcotics two days prior to the search. Since the confidential information related only to probable cause for the search, and not to petitioner's guilt of the offenses charged, he was not entitled to disclosure. *McCray* v. *Illinois, supra,* 386 U.S. at 309.[2]

For the first time it is contended that petitioner may have been entitled to an entrapment defense on the count charging him with sale of the heroin, if the informant proved to be Quincy "Dallas" Silver, the purchaser of the drug. However, by denying that he had ever made such a sale (Tr. 316), petitioner was precluded from raising the defense of entrapment. *United States* v. *Rodrigues,* 433 F. 2d 760, 761 (C.A. 1), certiorari denied, 401 U.S. 943; *Canal Zone* v. *Risbrook,* 454 F. 2d 725 (C.A. 5); *United States* v. *Shameia,* 464 F. 2d 629 (C.A. 6), certiorari denied, 409 U.S. 1076; *United States* v. *Carter,* 326 F. 2d 351, 353 (C.A. 7); *United States* v. *Mehciz,* 437 F. 2d 145, 149 (C.A. 9), certiorari denied, 402 U.S. 974. Contra, *Hansford* v. *United States,* 303 F. 2d 219, 221 (C.A. D.C.).

2. Petitioner contends that the government failed to establish an unbroken chain of custody of the heroin

---

[2] We note, in any event, that petitioner evidently is known as "Hardie Christopher", whereas his son calls himself "Hardie Christopher, Jr." (Tr. 291, 309-310). Petitioner also expressed doubt that the heroin found in the house could have belonged to his son (Tr. 328).

and that the physical evidence should therefore not have been admitted into evidence. However, the government need not establish a complete and exclusive chain of custody, but only an improbability that the evidence had been misidentified or altered. *United States* v. *McFadden,* 458 F. 2d 440 (C.A. 6), certiorari denied, 410 U.S. 911; *United States* v. *DeLarosa,* 450 F. 2d 1057, 1068-1069 (C.A. 3), certiorari denied *sub nom. Baskin* v. *United States,* 405 U.S. 927; *United States* v. *Robinson,* 447 F. 2d 1215 (C.A. D.C.). Petitioner may prevail only by a showing of such tampering as would establish abuse of discretion by the trial court in admitting the evidence. *United States* v. *DeLarosa, supra,* 450 F. 2d at 1069; *Gallego* v. *United States,* 276 F. 2d 914 (C.A. 9). Otherwise, the objection goes only to the weight of the evidence, and not to its admissibility. *United States* v. *Graham,* 464 F. 2d 1073, 1076 (C.A. 5).

The evidence in the instant case was ample to enable the trier of fact to conclude beyond a reasonable doubt that the evidence which was the subject of the laboratory analysis was the same evidence discovered at the time of the search of petitioner's home. The BNDD laboratory chemist[3] testified that the exhibits which he had analyzed, and which he identified at trial, had arrived at his laboratory by registered mail, in a sealed condition, and that he had broken the seal. The signature of the person who had mailed the envelope was on the back of the lock-seal envelope (Tr. 72, 78). Two of the same exhibits were identified by a Detroit

---

[3] The government called the chemist only to testify that the exhibits were packaged in prescription envelopes (Tr. 75). The parties had previously stipulated to the admissibility and contents of the laboratory reports (Tr. 7-8).

police officer as the objects which he had retrieved from the fleeing automobile in which Quincy Silver was riding, and which he had initialed and turned over to BNDD Agent Mahon (Tr. 104-106). Agent Mahon identified those two exhibits and certain exhibits found in petitioner's house as articles which he had initialed and placed in a lock-seal envelope, which he had then signed and transmitted by registered mail to the BNDD laboratory (Tr. 130-134). The agent had obtained positive results in chemical field tests for heroin conducted on one of the packages found in the house and one thrown from the automobile (Tr. 126, 130-131).

3. Petitioner's contention that he was improperly convicted of the sale of heroin to Quincy "Dallas" Silver solely on his own, uncorroborated, extra-judicial confession is without merit. The corroboration required to support the admissions of an accused is only that evidence which "supports the essential facts admitted sufficiently to justify a jury inference of their truth." *Opper* v. *United States,* 348 U.S. 84, 93. The facts of the instant case provide ample corroboration for petitioner's admission during the search of his home that he had just sold two ounces of heroin to "Dallas" for two hundred dollars apiece (Tr. 16). Two packages were retrieved from the street after having been thrown from the automobile in which Quincy "Dallas" Silver was riding when apprehended (Tr. 15). That automobile had been parked directly across the street from petitioner's house for at least fifteen minutes before the warrant was executed (Tr. 10-11). The narcotics thrown from the car were approximately equal in purity to the heroin found in petitioner's house, and were packaged in prescription envelopes identical to those found in petitioner's house (Tr. 19, 96-97). A large amount of cash was found in a bedroom used by

petitioner, and he admitted that the money consisted of proceeds from the sale of drugs (Tr. 14). These acts substantiated the trustworthiness of petitioner's admissions and warranted the submission to the court as trier of fact of the count alleging a sale of heroin to Quincy Silver.

4. Petitioner asserts that the conduct of the trial judge constituted undue interference and deprived petitioner of a fair trial. Although, as petitioner notes (Pet. 24-25), the court questioned some of the witnesses, a reading of the passages relied upon reveals no prejudicial conduct on the part of the court. The questions posed to the government laboratory chemist were routine and designed to ascertain the relevancy and authenticity of exhibits offered in evidence (Tr. 79-82).[4] On another occasion, the court's questions were clearly for the purpose of enabling the court to determine a method for receiving certain evidence, in view of a defense objection; petitioner's counsel expressed agreement with the court's solution (Tr. 91-92).

The court's questioning of defense witnesses cannot fairly be interpreted as an attempt to "impeach" them. Questions asked of petitioner and his son were for clarification, or were requests for repetition of previous answers which the court had been unable to hear or understand. We note that the court also asked many similar questions of government witnesses (*e.g.*, Tr. 10-11, 16-19, 106-107, 126-127, 132, 145, 148-149, 167). Numerous defense objections were sustained during the trial (*e.g.*, Tr. 14, 15, 19, 21, 29, 30-31, 67, 146, 156, 176), while a number of government objections were overruled (*e.g.*, Tr. 59, 74-75, 274-

[4] The laboratory reports had previously been admitted into evidence, pursuant to stipulation (Tr. 8, 98-99).

275, 287-288). In addition, the court acceded to petitioner's untimely request for an additional laboratory analysis of the physical evidence, and granted a half-day recess for the purpose (Tr. 142-143). In sum, the court's conduct manifested impartiality and fairness to petitioner.[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
JEROME M. FEIT,
JUDITH A. METZNER,
Attorneys.

OCTOBER 1973.

---

[5] Petitioner also complains that he was held in contempt for being fifteen minutes late for trial (Tr. 212-213). The record shows, however, that on an earlier occasion, petitioner had arrived forty-five minutes late because he "overslept" and "didn't feel too good." At that time, he was warned against further tardiness (Tr. 4-5). Under these circumstances, the imposition of a $50 fine for a second offense was neither arbitrary nor unjustified.